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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMIE LASTER,

Defendant and Appellant.

B265970

(Los Angeles County  
Super. Ct. No. BA431487)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund W. Clarke, Jr., Judge. Affirmed in part, reversed in part, and remanded with directions.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Michael Katz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Jimmie Laster (defendant) does not challenge his conviction for robbery, he only challenges his sentence. He asks us to decide whether, consistent with the Sixth and Fourteenth Amendments to the United States Constitution, the trial court could find defendant's 1994 conviction for violating Penal Code section 417.8 (drawing or exhibiting a deadly weapon with intent to resist arrest) was a serious felony by relying on preliminary hearing testimony given in that 1994 proceeding.

## I. BACKGROUND

In June 2015, a jury convicted defendant of second degree robbery in violation of Penal Code section 211.<sup>1</sup> In addition to the charged robbery, the information against defendant alleged he had two prior convictions for serious or violent felonies as defined in sections 667, subdivision (d) and 1170.12, subdivision (b) (hereafter, the strike priors) and six prior felony convictions within the meaning of section 667.5, subdivision (b) (hereafter, the prison priors). The two strike priors were his 1994 conviction (by plea) for drawing a firearm with intent to resist arrest and a 2002 conviction for robbery.

After a bench trial, the trial court found all the prior conviction allegations against defendant true.<sup>2</sup> In doing so, the court relied on a transcript of the preliminary hearing held in connection with defendant's prior section 417.8 offense to determine the offense qualified as a "strike," i.e., a serious felony. At that preliminary hearing, a Los Angeles Police Department detective testified defendant personally pointed a revolver at him after he (the detective) and two other law enforcement officers stopped a car in which defendant was a passenger. Although the trial court relied on the preliminary hearing transcript, there was no evidence before the court that the preliminary hearing testimony

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<sup>1</sup> Undesignated statutory references that follow are to the Penal Code.

<sup>2</sup> As was the case in *People v. Wilson* (2013) 219 Cal.App.4th 500 (*Wilson*), we find the record is best read to indicate defendant "waived his right to a jury trial on the fact of the prior conviction[s]—*but not on the facts required to prove the strike prior[s]* . . . ." (*Id.* at p. 507, italics in original.) The Attorney General does not contend otherwise.

served as the factual basis for defendant’s plea to the section 417.8 offense, nor any evidence concerning what defendant may have said or agreed to in entering a plea.

Having found defendant’s section 417.8 conviction was a serious felony because defendant personally used a firearm, and having found the other alleged serious felony conviction true (the 2002 robbery), the trial court sentenced defendant to a prison term of 35 years to life: 25 years to life for the robbery pursuant to the Three Strikes law (section 667, subdivisions (b) through (i) and section 1170.12) plus two consecutive 5-year terms for both strike priors under section 667, subdivision (a). The court did not address the prison prior allegations in imposing sentence.<sup>3</sup>

Defendant thereafter moved the court to correct the sentence imposed, arguing it should have either imposed or struck the section 667.5, subdivision (b) enhancements. In response, the court chose neither of those two options and instead imposed but stayed a one-year sentence on each of the six prison priors.<sup>4</sup>

## II. DISCUSSION

Citing *Descamps v. United States* (2013) 570 U.S. \_\_\_\_ [133 S.Ct. 2276] (*Descamps*), defendant contends the trial court violated his Sixth and Fourteenth Amendment rights in concluding his section 417.8 conviction was a serious felony. Defendant argues the court engaged in fact-finding that a jury and not a judge must undertake, namely, an effort “to discern what a . . . plea proceeding revealed[ ] about the defendant’s underlying conduct.” (*Id.* at p. 2288.) Although the Attorney General argues we are bound by a 2006 California Supreme Court decision (*People v. McGee* (2006) 38

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<sup>3</sup> When the court found those enhancements true, it stated it did not “foresee” and was not “inclined” to impose any prison terms for those priors “on top of the [35-year-to-life] sentence that the People [were] asking for.” The prosecution’s sentencing memorandum did not ask the court to impose any prison time for those enhancements.

<sup>4</sup> Defendant separately appealed from this amended judgment, and the result we reach in this case dictates the outcome in the later appeal, as specified in our concurrently-filed opinion in that case (*People v. Laster* (Oct. 19, 2016, B269858) [nonpub. opn.]).

Cal.4th 682 (*McGee*)) that authorizes a court to review the record of a prior conviction (including the transcript of a preliminary hearing) to determine whether the conviction is a serious felony, we conclude, as have other recent Court of Appeal decisions, that *McGee* is irreconcilable with *Descamps*. Reversal of the sentence and resentencing is therefore required.

Defendant additionally contends, and the Attorney General agrees, the trial court erred in sentencing defendant on the prison priors and in preparing the abstract of judgment. We come to the same conclusion, and we require the trial court to correct these errors on resentencing as well.

*A. We Decide Defendant's Constitutional Claim on the Merits*

Defendant did not object to the trial court's determination that his section 417.8 conviction was a serious felony. While failing to object to a sentence imposed by the trial court can in some cases result in forfeiture, even of constitutional claims (see, e.g., *Yakus v. United States* (1944) 321 U.S. 414, 444; *People v. D'Arcy* (2010) 48 Cal.4th 257, 290), we exercise our discretion to review defendant's claim on the merits because he raises a significant constitutional issue that affects his substantial rights and the error can be corrected without additional fact-finding. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888 & fn. 7; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Denard* (2015) 242 Cal.App.4th 1012, 1030, fn. 10 (*Denard*).)

*B. The Trial Court Erred in Resolving a Disputed Factual Matter to Conclude Defendant's Section 417.8 Conviction Was a "Strike"*

Section 417.8 states: "Every person who draws or exhibits any firearm, whether loaded or unloaded, or other deadly weapon, with the intent to resist or prevent the arrest or detention of himself or another by a peace officer shall be imprisoned in the state

prison for two, three, or four years.”<sup>5</sup> A conviction under section 417.8 may qualify as a serious felony, and therefore a “strike” for purposes of the Three Strikes law, if the defendant who committed it “personally use[d] a firearm” or “dangerous or deadly weapon.” (§ 1192.7, subd. (c)(8), (23).) Because an aider and abettor may be convicted under section 417.8 without personally using a firearm or other deadly weapon (*People v. Woodell* (1998) 17 Cal.4th 448, 453; *People v. Rodriguez* (1998) 17 Cal.4th 253, 261), the mere fact of defendant’s section 417.8 conviction does not indicate whether the conviction is a serious felony. He could have used a firearm personally or merely aided and abetted such use by another, and the conviction qualifies as a strike only if the former is true.

Under these circumstances, our Supreme Court previously held in *McGee* that trial courts may examine “the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted.” (*McGee, supra*, 38 Cal.4th at p. 691; see also *People v. Reed* (1996) 13 Cal.4th 217, 223 [preliminary hearing transcript excerpts are part of the record of prior conviction].)

In 2013, however, the United States Supreme Court held in *Descamps* that courts may not consider any documents beyond those that reveal the elements of a crime to determine whether a prior conviction for violating an “‘indivisible’ statute—*i.e.*, one not containing alternative elements . . . .” qualifies as a “violent felony” under the Armed Career Criminal Act of 1984 (ACCA). (*Descamps, supra*, 133 S.Ct. at pp. 2281-2282.) Under this “categorical approach,” sentencing courts can “‘look only to the statutory definitions’—*i.e.*, the elements—of a defendant’s prior offenses and *not* ‘to the particular facts underlying those convictions.’ [Citation.]” (*Id.* at p. 2283.) If the relevant criminal statute shared the same elements, or was narrower than, the “generic” ACCA crime, the prior conviction could serve as a predicate, “[b]ut if the statute swe[pt] more broadly than the generic crime, a conviction under that law [could not] count as an ACCA predicate,

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<sup>5</sup> There is no difference between the current provision and the version in effect when defendant was convicted.

even if the defendant actually committed the offense in its generic form.” (*Ibid.*) Where the prior conviction was predicated on a “divisible” statute in which the elements of the offense were listed in the alternative such that one alternative formed the basis of an ACCA predicate while another did not, trial courts could determine which set of elements formed the basis of the conviction by considering “a limited class of documents, such as indictments and jury instructions” in the record of conviction. (*Id.* at pp. 2281, 2283-2284.) This so-called “modified categorical approach” is not “an exception” to the categorical approach but rather “a tool” that “retain[ed] the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime.”<sup>6</sup> (*Id.* at p. 2285.)

The high court’s rationale flowed not only from the text and history of the ACCA, and considerations of fairness and practicality, but also “Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belong to juries.” (*Descamps, supra*, 133 S.Ct. at p. 2287.) The high court’s holding, which derived from principles previously articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Shepard v. United States, supra*, 544 U.S. 13, applied to convictions obtained after pleas as well as trials: “[W]hen a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense’s elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.” (*Descamps, supra*, at p. 2288.) Thus, a sentencing court may not “rely on its own finding about a non-elemental fact to increase a defendant’s maximum sentence.” (*Ibid.*)

Several recent Court of Appeal decisions have concluded that the holding in *McGee* is inconsistent with the Sixth Amendment analysis undertaken by the United

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<sup>6</sup> The process under both approaches is essentially the same. (*Id.* at p. 2285.) The court explained that even under the modified approach, “the documents we approved in *Taylor* [*Taylor v. United States* (1990) 495 U.S. 575] and *Shepard* [*Shepard v. United States* (2005) 544 U.S. 13]—*i.e.*, indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime’s elements. . . . When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.” (*Id.* at p. 2285, fn. 2.)

States Supreme Court in *Descamps*.<sup>7</sup> (*People v. McCaw* (2016) 1 Cal.App.5th 471, 482-483; *Denard, supra*, 242 Cal.App.4th at pp. 1028-1034; *People v. Marin* (2015) 240 Cal.App.4th 1344, 1363-1364; *People v. Saez* (2015) 237 Cal.App.4th 1177.) A case now on our Supreme Court’s docket (*People v. Gallardo* (Nov. 16, 2015, B257357) [nonpub. opn.], review granted Feb. 17, 2016, S231260) will provide a vehicle for the Court itself to state its view on the vitality of *McGee*. It therefore suffices for us to observe in the meantime that we agree with the analysis in the Court of Appeal opinions we have cited and conclude the constitutional principles articulated in *Descamps* compel reversal of the sentence imposed in this case. (See, e.g., *People v. Saez, supra*, 237 Cal.App.4th at p. 1207 [“[W]hile *Descamps* did not explicitly overrule *McGee*, *Descamps*’s discussion of the Sixth Amendment principles applicable when prior convictions are used to increase criminal sentences is clear and unavoidable and was adopted by eight of the nine justices on the high court. Under these unusual circumstances, we are compelled to apply those constitutional principles here”].) Defendant’s personal use of a firearm, as detailed in preliminary hearing testimony given in 1993, is a “non-elemental fact” impermissibly used to increase his maximum sentence.

C. *The Trial Court Must Impose Sentence for Defendant’s Prison Priors or Strike Them, and Must Correct the Abstract of Judgment*

Section 667.5, subdivision (b) requires the trial court to enhance a defendant’s sentence with a consecutive one-year prison term for each prior prison stint served by the defendant where he or she was convicted of a felony within five years of completing that term. “Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless

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<sup>7</sup> In a fifth case, *Wilson, supra*, 219 Cal.App.4th 500, the Sixth District held the trial court erred under *both McGee and Descamps* when it relied upon a preliminary hearing transcript—which reflected a disputed issue of fact that the court necessarily resolved—to determine defendant’s prior conviction was a strike. (*Id.* at pp. 511-515.)

stricken.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Thus, the trial court erred by staying defendant’s prison priors.

The abstract of judgment is also incorrect in another way: it shows defendant was sentenced to life with the possibility of parole, rather than 25 years to life, for the robbery crime in this case. The trial court will need to issue an amended abstract of judgment in light of our resolution of the other issues before us, and this error should be corrected when the further amended abstract is prepared.

#### DISPOSITION

Defendant’s robbery conviction is affirmed. Defendant’s sentence is reversed, and the matter is remanded for resentencing consistent with this opinion.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KUMAR, J.<sup>\*</sup>

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<sup>\*</sup> Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.